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Supreme Court, U.S.
FILED
NOV 27 1996

No. 96-243

In the
Supreme Court of the United States
October Term, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE MAYHEWS, *ET AL.* AND SECTION 28 PARTNERSHIP, LTD. SUGGESTING REVERSAL

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November, 1996

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AMICUS CURIAE BRIEF OF THE MAYHEWS, *ET AL.* AND SECTION 28 PARTNERSHIP, LTD.

INTERESTS OF AMICUS CURIAE

Amicus curiae, Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, Sunnyvale Properties, Ltd., and Section 28 Partnership, Ltd. (hereinafter collectively referred to as, *"amicus curiae"*), are property owners in the States of Texas and Florida who are interested in the formulation of a clear ripeness standard in land use cases which will result in the predictable application of an unambiguous rule nationwide. The Mayhews and Section 28 have been embroiled in land use litigation for nine and three quarter and four years respectively involving inconsistent and highly unequitable application of the ripeness doctrine. Both the Petitioner, Bernadine Suitum, and the Respondent, Tahoe Regional Planning Agency, have granted their consent to the filing of this *amicus curiae* brief.

STATEMENT OF CASE

In this case, a property owner's constitutional challenges to the application of land use regulations to her property were held not to be "ripe" even though the Tahoe Regional Planning Agency had reached a final determination that she would not be permitted to make any physical use of her property. In *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996), the Court of Appeals for the Ninth Circuit held that *all* of the Plaintiff's claims -- a regulatory taking claim, a due process claim and an equal protection claim -- were premature under the first prong of the ripeness standard formally enunciated in *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985).

The basis for the Ninth Circuit's ruling was that the Plaintiff, Mrs. Suitum, had not sought authorization for transferable development rights ("TDRs") and thus the Defendant, the Tahoe Regional Planning Agency ("TRPA"), had not made the requisite "final decision" under the first prong of the *Hamilton Bank* ripeness test:

> Without an application for the transfer of development rights, TRPA is foreclosed from determining the extent of the use of Suitum's property. By failing to apply to the TDR program, Suitum denies TRPA the ability to grant a "different form[] of relief ... which might abate the alleged taking." Without

> pursuit of the transfer of development rights, we cannot know whether the regulations have gone too far because at this point, no one knows how far the regulations have gone. Without attempting to transfer the rights she currently possesses, Suitum cannot know the "nature and extent of permitted development[,]" and thus cannot know the regulations' full economic impact or the degree of their interference with her reasonable investment-backed expectations, two critical components of a regulatory taking claim analysis.

Suitum, 80 F.3d at 362-63 (citations omitted). This Court granted Mrs. Suitum's Petition for Writ of Certiorari.

Amicus curiae respectfully submits that: 1) it is clear from the face of TRPA's regulations and the final decision of TRPA, that Mrs. Suitum will not be permitted by TRPA to make any physical use of her property itself; and 2) the amount or quantum of TDRs available to Mrs. Suitum is ascertainable from the face of the regulations themselves. The regulations do not permit any transfers to Mrs. Suitum's property; the only transfers which may occur are to properties other than the property which is the subject of the instant litigation.[1] Thus, just as Mrs. Suitum's rights with respect to the on-site use of her property are clear, so are the number or amount of TDRs Mrs. Suitum may utilize off-site.

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[1] *See* Petition for Writ of Certiorari at 6-8, and Appendix F which is attached to the Petition for Writ of Certiorari.

TRPA has made a final decision not to permit Mrs. Suitum any on-site development rights. This "final decision" is ascertainable from the plain language of TRPA's regulations, but Mrs. Suitum went further and gave TRPA another chance to consider whether any on-site use would be permitted through her submission of building plans which were rejected, as was a subsequent appeal. The existence of the potential off-site use of TDRs to mitigate Mrs. Suitum's inability to engage in any on-site use of her property -- or whether the TDR mechanism might be equated with "just compensation" -- is immaterial to the issue of whether there has been a final decision. In this case, TDRs are only relevant to a *trial court* determination of whether in fact Mrs. Suitum's property has been "taken," so as to require the payment of just compensation.

SUMMARY OF ARGUMENT

Amicus curiae submits that this Court should reverse the Ninth Circuit's decision in *Suitum*, 80 F.3d 359. That is so because TRPA indisputably made a final decision regarding a meaningful application for the development of Mrs. Suitum's property -- namely, no on-site development would be permitted on her property, effectively sterilizing the property and requiring it to be kept in its "natural state," *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1018 (1992), which constituted a sufficient factual setting for constitutional adjudication -- a concrete controversy ripe for review.

Whether or not the possibility of using TDRs "off-site" in any way mitigated the onerous effect of the application of

TRPA's regulations to the Suitum property has nothing to do with concreteness of the controversy, but rather has to do with whether Mrs. Suitum can demonstrate as a matter of fact that she has been denied all economically viable use of her property. It may be that Mrs. Suitum is ill-advised to proceed in the face of the unresolved factual matter of the potential value of TDRs, just as the *Penn Central* petitioners were ill-advised to proceed with a takings challenge based on the denial of a single, "grandiose" plan of development:

> . . . [i]t simply cannot be maintained, on this record, that appellants have been prohibited from occupying *any* portion of the airspace above the Terminal. While the Commission's actions in denying applications to construct an office building in excess of 50 stories above the Terminal may indicate that it will refuse to issue a certificate of appropriateness for any comparably sized structure, nothing the Commission has said or done suggests an intention to prohibit *any* construction above the Terminal.

Penn Central Trans. Co. v. City of New York, 438 U.S. 104, 136-137 (1978).

But just as this Court had jurisdiction in *Penn Central*, *amicus curiae* submits that this Court and the lower courts have jurisdiction *sub judice* in this matter.

Amicus curiae submits that *Suitum*, 80 F.3d 359, and other lower federal and state cases make clear the need for a plain exposition of the ripeness standard in land use cases.

Amicus curiae respectfully submits that the ripeness doctrine is more than a matter of academic curiosity. In the United States, the concept of property exists, not as an abstraction, but as the "yield" of a tension between the individual freedom to own and use property and the inherent power of the government to regulate for the public health, safety and welfare. The constitutional framework for the tension between public and private interests in the use of private property, however, is not a simple bright line test:

> . . . this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons.

Penn Central, 438 U.S. at 124. How far is "too far" is determined by "the particular circumstances [in that] case" in what are "essentially ad hoc, factual inquiries," *Id.*, and it is in failing to provide an effective and efficient forum for these *ad hoc* determinations that the lower federal courts and many state courts' treatment of ripeness threatens the very existence of property rights.

Put plainly, "[r]ights, constitutional and otherwise, do not exist in a vacuum." *Carey v. Piphus*, 435 U.S. 247, 254

(1978). In the absence of efficient and effective judicial review of the application of land use regulations to individual parcels of land, property rights exist only at the whim of the regulator. If the ripeness doctrine can be used to shield local government planning and zoning actions from judicial review by requiring useless applications for development approval which are not economically viable or repeat applications on the hope that a less "grandiose" plan might find favor with the local authorities, then there are effectively no property "rights." Justice Holmes long ago warned that "the natural tendency of human nature is to extend the qualification more and more until at last private property disappears." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). The ripeness rulings of the lower federal courts and many state courts which require multiple applications for development approval and useless and futile acts should not be allowed to provide cover for this "natural tendency."

At its core, the ripeness doctrine is nothing more than a modern expression of the time-honored juridical rule requiring a concrete controversy as a predicate to constitutional adjudication:

> The difference between an abstract question and a "case or controversy" is one of degree . . . [t]he basic inquiry is whether the "conflicting contentions of the parties . . . present a real, substantial controversy between parties having adverse legal interests, a dispute definite and concrete, not hypothetical or abstract."

Babbitt v. United Farm Workers National Union, 442 U.S. 289, 297-298 (1979)(citations omitted).

In the hands of the lower federal courts and many state courts, however, the ripeness doctrine has been transmogrified into a Sisyphean endurance course of multiple applications for development permission and of useless and futile acts. Consequently, the application of local government land use regulations to individual parcels of land are immunized from judicial review for all but the wealthy and very patient. *Amicus curiae* submits that a careful reading of this Court's decisions make it clear that the ripeness doctrine is a simple standard intended to ensure a sufficiently factual setting for constitutional adjudication -- nothing more and nothing less.

Amicus curiae respectfully submits the following articulation of this Court's ripeness holdings for the Court's consideration and prays this Court confirm its contours and content:

1. As applied, economically beneficial use, justice and fairness and substantially advances takings, due process and equal protection challenges to land use regulations which have been in effect over a period of time are ripe when *a* final decision is made in regard to a meaningful application for development approval (*e.g., Hernandez v. City of Lafayette*, 643 F.2d 1188 (5th Cir. 1981); *Penn Central,* 438 U.S. 104); and

2. As applied, economically beneficial use, justice and fairness and substantially advances takings, due process

and equal protection challenges to newly enacted land use regulations are ripe:

1) automatically, if development rights are clear from regulations (*e.g., First English Evan. Luth. Church v. City of Los Angeles*, 482 U.S. 304 (1987); *Lucas*, 505 U.S. 1003); or

2) if development rights are not clear from the face of regulations (*e.g., Penn Central,* 438 U.S. 104; *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Hamilton Bank*, 473 U.S. 172; *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986)):

a) when a local government makes *a* final decision in regard to *a* meaningful application for development approval (*e.g., Penn Central*, 438 U.S. 104; *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)); or

b) when a local government otherwise takes an authoritative position in regard to development rights (*e.g., San Diego Gas and Electric Co. v. City of San Diego*, 450 U.S. 621 (1981)); or

c) where the preponderance of the evidence demonstrates that it would be futile or "pointless" to apply for development approval. (*MacDonald*, 477 U.S. 340; *Lucas*, 505 U.S. 1003.)

Under this articulation of the Court's ripeness standard, the application and availability of TDRs is irrelevant to the question of ripeness. TRPA made a final decision in regard to a meaningful application for development approval and Mrs. Suitum's TDR rights are clear from the face of TRPA's regulations.

ARGUMENT

I.
THE PRECEPTS OF THE SUPREME COURT'S RIPENESS DOCTRINE: REQUIREMENT OF A FINAL DECISION, NOT PRO FORMA MULTIPLE APPLICATIONS

Amicus curiae respectfully submits that a careful review of this Court's ripeness decisions reveals a consistent and reasonable standard for when a sufficient factual setting exists to support constitutional adjudication of as applied challenges to land use regulations. If the development rights appurtenant to a parcel of land are all clear from the face of the challenged regulations, then a constitutional challenge is ripe. If development rights under the challenged regulations are not clear, then a constitutional claim is not ripe until a final decision has been made by the appropriate agency in regard to a meaningful application for development approval, unless the permitted development rights are otherwise apparent or it is clear that an application for development approval would be a useless or futile act.

A. Supreme Court Precedents

In the land use arena,[2] the origins of the ripeness doctrine are found in *Penn Central*, 483 U.S. 104, where the Supreme Court held that the fact that the City had denied one particularly "grandiose" plan of development did not necessarily mean that the City would not approve a less ambitious plan and that therefore it was not possible for the Court to find that the planning and zoning actions of the City had effected a taking under the Fifth and Fourteenth Amendments. Although this Court found that it was possible that the City might approve a less-grandiose plan, the Court did

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[2] *Amicus curiae* respectfully submits that the context in which the ripeness doctrine evolved is important. In the early 70's, the "taking issue" became the focal point of land use law -- if a regulation went "too far," was it invalid, or was it a taking which required compensation? Government lawyers, not surprisingly argued that declaratory and injunctive relief was the only relief should be available while property owners argued for just compensation. In a series of cases including *Penn Central*, 483 U.S. 104, *Agins*, 447 U.S. 51, *San Diego Gas*, 450 U.S. 621, *Hamilton Bank*, 473 U.S. 172, and *MacDonald*, 477 U.S. 340, the Supreme Court wrestled with the taking issue, however it was not until *First English*, 482 U.S. 302, that the Court finally held that the constitutional imperative for just compensation applies to a regulation which is adjudicated to go "too far." Although the taking issue debate took almost 15 years to resolve, it became increasingly apparent in the late 70's and early 80's that the Court would ultimately rule in favor of property rights and hold that just compensation was required for enforcement of an overly restrictive regulation. In the face of this challenge, governmental lawyers and special interest groups, promoting public planning and regulation of the private use of private property, tried to stave off a ruling by invoking the concrete controversy requirement defense which had helped to avoid a ruling on the merits of the taking issue in *Agins*, 447 U.S. 51. It was out of this attempt to "avoid" the merits at all cost that the ripeness doctrine emerged.

not dismiss the matter for want of subject matter jurisdiction because the property owner had only tendered one application. Instead the Court adjudicated the concrete controversy at hand -- whether the planning and zoning actions of the City had effected a taking -- and found in favor of the City.

The ripeness concept was next considered in a facial takings claim in *Agins*, 477 U.S. 255. In *Agins*, the City adopted a new set of zoning regulations which downzoned property with spectacular views of San Francisco Bay. The new zoning district allowed a range of densities of one to five units per acre, based on a complex set of performance standards.[3] A property owner sued, challenging the regulations as a taking and seeking just compensation under the Constitution of the United States.

Although "ripeness" was not directly raised in *Agins*, the Court's discussion of the issue presented established the germ which would ultimately give rise to the doctrine:

> The [California Supreme Court] did not consider whether the zoning ordinances would be unconstitutional if applied to prevent appellants from building five homes. *Because the appellants have not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of the specific zoning provisions.* Thus, the only

[3] *See generally*, Kendig, L., PERFORMANCE ZONING (American Planning Association 1978).

> question properly before us is whether the mere enactment of the zoning ordinances constitutes a taking.

Agins, 477 U.S. at 260 (citations omitted)(emphasis added).

The next year, the Supreme Court heard *San Diego Gas*, 450 U.S. 621, but once again found itself unable to reach the merits of the taking issue because of deficiencies vis-a-vis federal jurisdiction -- the decision of the California court was determined not to be final. Importantly, *San Diego Gas* was "ripe" in terms of a concrete controversy even though no application for development approval had been submitted. In *San Diego Gas*, ripeness was grounded in the actions of the County which disclosed the County's authoritative position in regard to San Diego Gas' development rights.

Between *San Diego Gas*, 450 U.S. 621, and the next major Supreme Court encounter with the taking issue in *Hodel v. Irving*, 481 U.S. 704 (1987), the taking issue, suffused with a new dynamic in municipal litigation arising out of *Monell v. Dept. of Social Services of the City of New York*, 436 U.S. 658 (1978),[4] percolated through the district and circuit courts in cases like *Hernandez*, 643 F.2d 1188:

> . . . where the application of a general zoning ordinance to a particular person's property does not initially deny the owner an economically viable use of his land, but thereafter does come

[4] In *Monell*, 436 U.S. 658, the Court held that a municipality was a person for purposes of the Civil Rights Act of 1871, 42 U.S.C.A. § 1983.

> to result in such a denial due to changing circumstances, or where a zoning classification initially denies a property owner an economically viable use of his land, but the owner delays or fails to timely seek relief from such a classification, we conclude that a "taking" does not occur until the municipality's governing body is given a realistic opportunity and reasonable time within which to review its zoning legislation vis-a-vis the particular property and to correct the inequity.

Hernandez, 643 F.2d at 1200.

In *Hodel*, 481 U.S. 704, an as applied constitutional challenge to section 207 of the Indian Land Consolidation Act was rejected as not being ripe because the application of the statutory regime at issue to individual parcels of land was not clear from the face of the statute and no applications for use authorization had been requested.

In 1985, the Supreme Court took up *Hamilton Bank*, 473 U.S. 172, where the Sixth Circuit had held that a local government decision to downzone a previously approved subdivision constituted a taking and awarded just compensation. This Court held that on the record before the Court, the taking issue was premature because of the unexplored possibility that the subdivision could be developed as previously approved:

> As the Court has made clear in several recent decisions, a claim that the application of

> government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue.

Hamilton Bank, 473 U.S. at 186. Simply put, the Court found that the taking issue was not yet a justiciable controversy because of the uncertainty as to the application of the County's planning and zoning regulations to the subdivision. Importantly, the key element of this Court's holding in *Hamilton Bank* was the fact that the application for development approval was not meaningful. That was so because the applicable subdivision regulations required that an applicant for subdivision approval secure all variances necessary for the proposed subdivision. The property owner's refusal to obtain required variances meant, as a matter of fact and law, that the application was not meaningful:

> Indeed, in a letter to the Commission written shortly before its June 18, 1981, meeting to consider the preliminary sketch, respondent took the position that it would not request variances from the Commission until after the Commission approved the proposed plat . . . The Commission's regulations clearly indicated that unless a developer applied for a variance in writing and upon notice to other property owners, "any condition shown on the plat which would require a variance will constitute grounds for disapproval of the plat." Thus, in the face of

> respondent's refusal to follow the procedures for requesting a variance, and its refusal to provide specific information about the variances it would require, respondent hardly can maintain that the Commission's disapproval of the preliminary plan was equivalent to a final decision that no variances would be granted.

Hamilton Bank, 473 U.S. at 190.

The year after *Hamilton Bank*, 473 U.S. 172, this Court avoided the merits of the taking issue in *MacDonald*, 477 U.S. 40, by once again invoking the ripeness doctrine. In *MacDonald*, a property owner sought subdivision approval. The County denied the plat and the property owner sought just compensation in an inverse condemnation action. The California courts dismissed the action and the matter was presented to the Supreme Court by the property owner seeking determination of the merits of the taking issue. The Court once again demurred, however, on the grounds that the denial of a subdivision plat did not constitute a final decision as to the application of the County's planning and zoning regulations:

> Until a property owner has "obtained a final decision regarding the application of the zoning ordinance and subdivision regulations to its property," "it is impossible to tell whether the land retain[s] any reasonable beneficial use or whether [existing] expectation interests ha[ve] been destroyed."

MacDonald, 477 U.S. at 349 (citations omitted). This Court's decision was based on a record which showed that the plat was denied because of deficiencies in the application and therefore was not a *meaningful* application; however, the conservation coalition claimed that the decision required multiple applications in order for a taking claim to be ripe.

In the years after *MacDonald*, the lower courts, at the insistence of besieged government lawyers, have advocated all manner of ripeness doctrine defenses to avoid the merits of the taking issue, even though the Supreme Court made it clear in 1987 that:

> . . . where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

First English, 482 U.S. at 321.

In *First English*, the constitutional challenge was ripe even though no application for development approval had been submitted. Ripeness was grounded on the facts that the challenged regulations were newly enacted and that the property owner's right to use its property was clear from the face of the regulations. Similarly in *Nollan*, 483 U.S. 825, decided during the same term, a takings challenge was ripe after a single decision in regard to one application for development approval.

One year later, in *Pennell v. City of San Jose*, 485 U.S. 1 (1988), this Court found that a takings claim to a rent control ordinance was not ripe for as applied review because the actual application of the ordinance to an individual property was not clear from the face of the regulations and no application for approval had been submitted.

Then, in *Lucas*, 505 U.S. 1003, the state court found that the property owner's development rights were clear on the face of the challenged regulations and this Court held that the constitutional challenges were ripe for adjudication

Finally, in *Dolan*, 512 U.S. 374, a challenge to a development exaction was found to be ripe based on a final decision on a meaningful application for development approval.

B. Multiple Applications or Applications for All Possible Uses Are Not Required, and the Futility Doctrine May Render Any Application "Pointless"

In *Hamilton Bank*, the Court formally established the simple and succinct "final decision" ripeness test:

> . . . a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulation has reached *a* final decision regarding the application of the regulations to the property at issue.

Hamilton Bank, 473 U.S. at 186 (emphasis added). The *Hamilton Bank* Court concluded that a "final decision," under the particular facts of the case, required both a "plan for developing [the] property" and an application for a variance. *Hamilton Bank*, 473 U.S. at 187-88. The variance requirement in *Hamilton Bank* was based on the factual circumstances of that case wherein the regulations specifically noted that a variance was required *in addition to plat approval* to correct any deficiencies in the application. *Hamilton Bank*, 473 U.S. at 189 n.10 (quoting regulations). A variance was required because, based on the record before the Court, a variance could have resolved the minor size and configuration problems raised by the local government in denying the application. *See Hamilton Bank*, 473 U.S. at 193 (variance required to determine whether the landowner could "develop the subdivision in the manner [it] proposed"). No *per se* requirement of multiple applications or applications for every conceivable use was adopted by the Court.

Subsequent to its holding in *Hamilton Bank*, the Supreme Court found the just compensation taking claim in *MacDonald*, 477 U.S. 340, to be unripe. In *MacDonald*, the Court held that the County's rejection of a preliminary subdivision plan which it determined had failed to adequately deal with several infrastructure issues, was not a "meaningful application" and that the County's rejection did not constitute a "final decision." On the record in those proceedings, there was still a possibility that "valuable development" might be permitted. Importantly, zoning was not at issue in *MacDonald* -- only the layout of the project was subject to review. *MacDonald*, 477 U.S. at 351 and 353 n.8. Because the property owner's application, which was denominated "preliminary,"

was deficient in several respects, the Court determined that it was not "meaningful" and that there was no final decision as to what development would be permitted.

MacDonald did not hold, and neither has this Court ever held, that more than one application is required before a claim is ripe for review, just that "*a* meaningful" application must be submitted before the *Hamilton Bank* test will be satisfied. Both before and after *MacDonald*, the Supreme Court has uniformly held that "meaningful" means a valid application, something more than *no effort at all to comply with local regulations.*[5] Indeed, the Supreme Court specifically noted that the doctrine should not be used to work injustices:

> A property owner is of course not required to resort to piecemeal litigation or otherwise unfair procedures in order to obtain this determination.

MacDonald, 477 U.S. at 352 n.7. *MacDonald* is further limited by the fact that the Court specifically determined that *there were remaining economically viable uses available to the property.* *MacDonald*, 477 U.S. at 345, 351 and 352 n.8. Because of this conclusion, and the fact that the initial application was only preliminary and inadequate in several respects, the Court determined that there had been no final decision.

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[5] *Compare Agins*, 447 U.S. at 260, (no application whatsoever renders claims unripe) *with Lucas*, 505 U.S. at 1012 n.3 (no application required where application would be "pointless").

Finally, this Court has also made it clear that no application will be required where such application would be futile or "pointless," *Lucas*, 505 U.S. at 1012 n.3; or said another way, no application is required where the regulations are clear on their face as to what development will be allowed.

II.
TOWARDS A UNIFIED STATEMENT OF THE RIPENESS REQUIREMENT IN LAND USE CASES AND THE NINTH CIRCUIT'S DEPARTURE FROM THE RULE

Amicus curiae respectfully submits that the precedents of this Court's ripeness decisions in *Penn Central*, 438 U.S. 104, *Agins*, 447 U.S. 255, *San Diego Gas*, 450 U.S. 621, *Hamilton Bank*, 473 U.S. 172, *MacDonald*, 477 U.S. 340, *Hodel*, 452 U.S. 264, *First English* , 482 U.S. 304, *Nollan*, 483 U.S. 825, *Pennell*, 485 U.S. 1, *Lucas*, 505 U.S. 1003, and *Dolan*, 512 U.S. 374, make clear the Ninth Circuit's error in requiring Mrs. Suitum to pursue TDRs as a prerequisite to suit.

What emerges from careful examination of these Supreme Court ripeness cases is a relatively simple rule which may be restated as two general rules.

First, as was the case in *First English*, 482 U.S. 304 and *Lucas*, 505 U.S. 1003 (no use of property allowed pursuant to the terms of regulations themselves), a land use case will *automatically* be ripe for review where the development rights are clear from the regulations. The property owners' claims were ripe in *First English* and *Lucas* because it was clear from the face of the regulations -- even though there had been no

applications filed whatsoever in either case -- that no use would be permitted of either property. Similarly, Mrs. Suitum's claims are ripe for review because there is simply no ambiguity as to what TRPA's regulations allow Mrs. Suitum to do with her property: *nothing*.

Where the development rights are not clear from the regulations as was the case in, for example, *Penn Central*, 438 U.S. 104, *Agins*, 447 U.S. 255, *San Diego Gas*, 450 U.S. 621, *Hamilton Bank*, 473 U.S. 172 and *MacDonald*, 477 U.S. 340, the Supreme Court ripeness decisions establish three different alternatives which may ripen a land use claim. First, a claim may ripen where a local government makes *a* final decision in regard to a meaningful application for development approval. Once *a* final decision is made regarding *one* meaningful application, no more applications are required unless there is some deficiency in an application which might be corrected through, for example, a variance. There is not, and never has been, any requirement that a property owner apply for every conceivable use before a claim will ripen for review. *Penn Central*, 438 U.S. 104, is illustrative of this principle.

In *Penn Central*, 438 U.S. 104, a meaningful application was filed seeking approval of an office building above a train station. The case was determined ripe and no additional applications were required even though TDRs were available to the plaintiff. Instead, the Court found that the plaintiff had failed to demonstrate a taking and suggested that TDRs might be considered "mitigation" of the burdens imposed by the regulations in issue. *Penn Central*, 438 U.S. at 137 ("[t]he [TDRs] undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason,

are to be taken into account in consideration of the impact of the regulation"). Here too, Mrs. Suitum's case is ripe for review and the trier of fact will need to determine whether the existence of the TDRs provides an economically viable use or effective payment of compensation; however, an application to use the TDRs has no relevance in terms of whether there was a final decision. Finally, even though Mrs. Suitum's rights were clear from the regulations themselves, she made an additional, albeit legally unnecessary effort, in submitting plans to construct a residence on her property. In connection with Mrs. Suitum's meaningful application, TRPA determined that no development would be permitted on site because the property was within the Stream Environment Zone ("SEZ"). Mrs. Suitum even unsuccessfully appealed TRPA's decision. No more is necessary to state a ripe claim.

Where development rights are not clear from the regulations, a claim may also ripen where the government otherwise takes an authoritative position in regard to the development rights. For example, in *San Diego Gas*, 450 U.S. 621, the Supreme Court found that it did not have jurisdiction to review a California Supreme Court decision denying monetary compensation because a remand to the trial court made the decision non-final. However, had the Supreme Court exercised its jurisdiction, it is plain that there was a final decision -- an "otherwise authoritative position" -- regarding the property in issue. Specifically, the City of San Diego designated the entirety of the plaintiff's property as an "open-space area," *San Diego Gas*, 450 U.S. at 626, and proposed as part of its open-space plan to "acquire the property to preserve it as parkland," *Id.*, even going so far as unsuccessfully attempting to issue bonds for the acquisition. Similarly, Mrs.

Suitum's property has been designated in TRPA's 1987 Plan as ineligible for development and TRPA has officially declared the property as within the SEZ, an area in which no development is permitted. TRPA has otherwise taken an authoritative position in regard to Mrs. Suitum's development rights; *she has none*.

Finally, where development rights are unclear from the face of regulations, a claim may ripen where the preponderance of the evidence demonstrates that it would be futile to apply for development approval. The law abhors useless acts and admits where it is plain that an application for development approval will be futile, a constitutional challenge is ripe. Mrs. Suitum's application for TDRs is also futile and unnecessary; TRPA has taken a definitive position and both the amount and value of the TDRs are readily ascertainable.

What is needed is not a new rule of law, but a comprehensive articulation of existing, albeit scattered, law into one coherent standard. The following chart of Supreme Court opinions illustrates this already existing law, divided up into the following three categories: (1) rights clear from regulations (claims always ripe); one meaningful application (claims always ripe); or some other authoritative position (claims always ripe):

Name of Case	Rights Clear from Regulations	One Meaningful Application	Other Authoritative Position	Ripe
Penn Central, 438 U.S. 104 (1978).	NO	YES	NO	YES
Agins, 447 U.S. 255 (1980).	NO	NO	NO	NO
San Diego Gas, 450 U.S. 621 (1981).	NO	NO	YES	YES
Hamilton Bank, 473 U.S. 172 (1985).	NO	NO	NO	NO
MacDonald, 477 U.S. 340 (1986).	NO	NO	NO	NO
Hodel, 452 U.S. 264 (1987).	NO	NO	NO	NO
First English, 482 U.S. 304 (1987).	YES	NO	NO	YES
Nollan, 483 U.S. 825 (1987).	NO	YES	NO	YES
Pennell, 485 U.S. 1 (1988).	NO	NO	NO	NO
Lucas, 505 U.S. 1003 (1992).	YES	NO	NO	YES
Dolan, 512 U.S. 374 (1994).	NO	YES	NO	YES

III.
THE NINTH CIRCUIT ERRED IN REQUIRING MRS. SUITUM TO UTILIZE HER TRANSFERABLE DEVELOPMENT RIGHTS AS A PREREQUISITE TO SUIT

The Ninth Circuit incorrectly formulated a new ripeness test in requiring that Mrs. Suitum actually sell her TDRs in order to state ripe constitutional claims as the existence of TDRs, and the characterization of the TDRs by the Ninth Circuit as a potential "use," is irrelevant to the final decision first prong of the *Hamilton Bank*, 473 U.S. 172, ripeness test.

There can be no real dispute that: (1) TRPA made a final decision not to allow any on-site, economically viable use of Mrs. Suitum's property; and (2) Mrs. Suitum submitted a meaningful application to use her property in the form of building plans which led to TRPA's determination that the property was within the SEZ and could not developed. The existence of TDRs, and Mrs. Suitum's admitted failure to utilize those TDRs, are wholly irrelevant to the final determination analysis. In this sense, the Ninth Circuit's focus on TDRs as a "use," is misplaced.

As has already been discussed, there is no requirement that a putative plaintiff apply for each and every potential "use" of his property to state a ripe claim. All that is necessary for a claim to be ripe is *a* final decision by the regulatory authority. As may be the case with Mrs. Suitum, if there are remaining potential uses of the property -- and there has nonetheless been a final decision -- then the plaintiff will bear the burden of demonstrating, as the plaintiff would in any taking case, that

those uses do not provide an economically viable or beneficial use. TDRs may be a "use," or they may in some cases be so valuable as to constitute payment of just compensation; however, the classification of TDRs as a "use" is simply not pertinent to a reasoned or rational ripeness analysis.

The ripeness doctrine is not a rule of exhaustion, financial or otherwise. Mrs. Suitum should not be required, as a matter of sound law or fundamental fairness, to apply for every conceivable use to state a ripe claim.

CONCLUSION

Amicus curiae, Charles Mayhew, Sr., Charles Mayhew, Jr., the Estate of Audrey Mayhew, Sunnyvale Properties, Ltd., and Section 28 Partnership, Ltd., respectfully request that the Supreme Court reverse the Ninth Circuit's decision in *Suitum v. Tahoe Regional Planning Agency*, 80 F.3d 359 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 293 (1996) and remand for trial on the merits.

Mrs. Suitum may be unable to prove that TRPA has taken her property because of the TDRs, but their existence is irrelevant to the issue of whether there has been a final decision which is ripe for review. This case is patently ripe for review: TRPA has definitively and unequivocally determined that no development will be permitted on Mrs. Suitum's property and that decision is final and ripe for adjudication. Whether TDRs are properly considered a "use" or just compensation is only pertinent to the question of whether there has been a taking.

No property owner should be required to apply for every conceivable use of his property to state a ripe taking claim; all that is required is *a* final decision.

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PROOF OF SERVICE

I, Charles L. Siemon, a member of the Supreme Court Bar, hereby certify that three copies of the foregoing *Amicus Curiae* Brief of the Mayhews, *et al.* and Section 28 Partnership, Ltd. Suggesting Reversal were served. Service was made on the following individuals by first class mail on November 27, 1996:

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